
From: Opalski, Dan
To: Powers, David
Sent: 2/7/2014 1:51:45 PM
Subject: RE: CZMA meeting 1/31/14

Very interesting...heard anything about how the 1/31 meeting went?

From: Powers, David
Sent: Tuesday, February 04, 2014 12:38 PM
To: Psyk, Christine; allison.castellan@noaa.gov; Wayne, Don; Henning, Alan; Croxton, Dave; Wu, Jennifer; Lidgard, Michael
Cc: Opalski, Dan
Subject: FW: CZMA meeting 1/31/14

The e-mail string below highlights a long standing concern that agencies/organizations responsible for treating and discharging water, and meeting point source effluent limits, have with limited controls on nonpoint sources...particularly ag and forestry nonpoint sources. Its my understanding that the City of Portland and the OR Assoc. of Clean Water Agencies (ACWA) support DEQ taking tougher action on forestry, ag, and stormwater runoff...and may support NOAA/EPA taking action via CZARA. Note discussions on Ag, Forestry, TMDLs and general permits.

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From: Hottenroth, Dawn [<mailto:DAWN.HOTTENROTH@portlandoregon.gov>]
Sent: Thursday, January 30, 2014 3:52 PM
To: 'ACWA'; Tracy Rutten; Mark Yeager; Stephanie Eisner; TARNOW Karen E; FOSTER Eugene P; Erin Doyle; Wendy Edde; Therese Walch; Jennifer Belknap-Williamson
Subject: RE: CZMA meeting 1/31/14

Sorry I am going to miss the phone call in - I have a conflict. Here are the thoughts BES has thus far (its a long list):

Proposed Disapproval Findings of Oregon's Coastal Nonpoint Program

This public review offers an opportunity for jurisdictions across the state to influence the efficacy of the TMDL program and the over-reliance of DEQ to push for stricter controls on developed urban areas because they are easier to regulate than agricultural and forestry operations.

In general, despite the potential loss of DEQ funding, ACWA should support the EPA denial of the Oregon state programs- especially for Ag and forestry issues., as a way to highlight the need for DEQ to more aggressively regulate non-point/non-urban sources of pollution, but at the same time provide suggestions on how Oregon's programs can be successful.

Our comments generally fall into 3 main categories:

Sufficiency of Programs

A. DEQ review of Current Programs

Currently DEQ materials state that DEQ only enforces if TMDL implementation plans are not submitted, not on the ability of the plan to meet WQ standards itself. Both the Forestry Practices Act and the Agricultural Water Quality Management Act clearly state that if Oregon Department of Agriculture (ODA) and Oregon Department of Forestry (ODF) programs are found to be insufficient then DEQ can step in and regulate those sites (I will get ORS citations for you later if you need them). The Oregon Department of Justice even clearly communicated to DEQ in a 7/2/2010 memo (part of the Oregon submittal) that they clearly have "legal authority to develop and enforce source specific Load Allocations (LAs) for landowners, including forest lands." There

is some guidance about reviewing for "adequacy" of plans in the IMD for DEQ staff, but it again appears limited.

B. Update to DEQ Program Materials

Many of the materials DEQ submitted include a focus almost entirely on urban/permitted stormwater runoff. As many jurisdictions stormwater permits (both MS4 and general Industrial Stormwater) start to show effectiveness, DEQ must transfer its focus to other non-point source discharges, primarily agricultural and siculture discharges. Current DEQ materials lightly touch on these sectors.

In 1998, DEQ and ODA entered into a memorandum of agreement (MOA) about implementing TMDL programs. It primarily addresses establishing TMDLs and is virtually silent about implementation issues such as program efficacy, ongoing monitoring and reporting requirements. There is an ODF agreement on land conversions (where? Could not find it on EPA or DEQ website) and supposedly a similar 2002 TMDL agreement with ODF which I have yet to find (none appears to be submitted to EPA).

C. Inadequate ODA and ODF reporting

ODA and ODF administer primarily voluntary and educational programs for agricultural and forest lands within TMDL listed basins. Because they appear to have no specific requirements for reporting to DEQ about TMDL implementation program efficacy (nothing appears to be submitted to EPA), it is difficult to identify if their programs are having any impact. Note: for urban jurisdictions a TMDL **annual** report is required.

Using the Curry County AQWMP as an example, ODA appears to have provided a list of specific BMPs to meet CZMA (and therefore TMDL) requirements. However, ODA reporting does not appear to look at implementation of any of those BMPs put forward for CZMA compliance (Appendix C of the Curry County AQWMP). MS4 annual TMDL reports must specifically address BMPs we have put forward in TMDL Implementation Plans. It seems appropriate that ODA address the implementation of all the BMPs listed in Appendix C of the Curry County plan (or similar BMP lists for other plans) in its reporting. This inconsistency in reporting is inequitable.

The June 2013 CZMA submittal attachment clearly states that ODF does not require reporting on plan implementation from its program participants, even though a plan is required for those landowners in order to receive federal cost share dollars administered by ODF. This seems a huge missed opportunity. In addition they only have management plans in place for a mere 18% of their acres. Is that because plans are voluntary or because the 88% of acres are held by state and national forests?

The only type of TMDL reporting document found on the ODA site is a 9/13/12 copy of the required 2 year summary for the WQMP committee for the Umpqua basin. The document is a single page and primarily focused on outreach efforts. It does not appear to address many of the WQMP issues for that basin. By comparison the City of Portland **annual** TMDL report is 37 pages long. Such discrepancies do not seem equitable.

D. Efficacy of Current Programs

While DEQ appears to have limited criteria developed to judge efficacy of TMDL and CZMA program elements, the CZMA review unto itself would seem to clearly state that NOAA and EPA do not think Oregon Plans are sufficient. In addition the May 2011 biological opinion from ODFW/NMFS states "...analysis of freshwater habitat trends for the Oregon coast found little evidence for an overall improving trend in freshwater habitat conditions since the mid-1990s, and evidence of negative trends in some strata...". The state of Oregon seems to have received ample evidence and opinion that programs are insufficient. Oregon DEQ's own TMDL Toxics Issue paper from May 2011 identified as shortcoming #9 "Lack of progress to ensure that actions taken to implement the TMDL load allocations are effective".

Rather than take proposed disapproval and other evidence as a sign to provide additional regulation, Oregon is arguing that their programs are effective when they may not be. Oregon has operated voluntary forestry and agricultural compliance programs for over 40 years and 20 years respectively and water quality issues are still present. What has to happen for DEQ to adequately regulate these programs? The 1999 Governor's executive order clearly states that if monitoring information finds agency programs insufficient, then agencies will "seek appropriate changes in their regulations, policies, programs, measures and other areas..." (Item 1(m))

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Confusing DEQ Statements in Correspondence to EPA

1. July 1, 2013 Memo to EPA and NOAA

Last page "... fish productivity has improved in recent years. Productivity is an indicator of a population's resiliency and likelihood of persistence".

This statement seems contrary to the NOAA biological opinion which clearly states that most experts feel recent recoveries will not last, are due to favorable oceanic conditions (not improvements in stream conditions) and that they still have long term "moderate" concerns for the Coastal ESU.

2. July 1, 2013 Attachment to EPA and NOAA

Page 25 - "Voluntary reporting of OPSW voluntary measures has diminished in past years, however it is reasonable to assume that voluntary measure implementation has not."

This assumption seems highly questionable. Given the downturn in the economy, it seems unrealistic - especially without supporting data of any kind - to assume forestry program participants are doing the same level of restoration work as in years past.

3. September 20, 2013 Memo to EPA and NOAA

a. Page 1 - "The voluntary program will be implemented by DEQ through its TMDL authorities and the regulatory program will be implemented by DEQ under its permitting authorities."

This statement could be interpreted to read that there are no "regulatory authorities in the TMDL program". There is a significant regulatory component with the TMDL program. DEQ's preference to use only NPDES permitting for regulatory compliance does not change the fact that TMDLs are implemented as a regulatory order and therefore can be enforced as any other regulatory order. This statement reinforces the inequitable focus of DEQ on urban jurisdictional discharges.

b. Page 2 - "The regulatory component will be implemented through the stormwater permitting program and will be implemented once the USEPA finalizes the national stormwater rule..."

This statement again seems to show a bias toward urban stormwater NPDES permitting and does not clearly account for CAFO and pesticide application permitting that are clearly not part of the current EPA stormwater rule discussion. DEQ has had over 3 years to work on improvements to discharge permitting programs and has chosen not to do so. While the desire to combine implementation efforts with the new national stormwater rule is understandable, DEQ could have and maybe should have addressed CZMA issues immediately and not grouped them with any new stormwater rule issues. Besides the main elements of the proposed national rule have not changed for the last 2 years, and are unlikely to change significantly in the near future.

In addition the national rule is likely at least another year from final adoption and then the state will have 5 years to implement it. The desire to wait for the new national stormwater rules will further impede progress.

4. December 19, 2013 Background Paper from DEQ website

Last page - "Studies show that timber harvest and road building conducted under modern requirements and practices affect streams to the extent that is within the natural variation of conditions"

This statement is confusing given the statement on page 17 of the July 1, 2013 memo that clearly states "... the Board determined that there is monitoring (Groom et al. 2011b) and evidence that documents the degradation of resources maintained (i.e. there is evidence that forest practices... do not ensure that state forest operations meet the state water quality standards..."

The November 2013 RipStream report to the Board of Forestry found natural conditions only to exist for state forests, not private forests ODF regulates. In addition the state forest findings were somewhat questionable given the limited sites and lack of harvest related variable in the model. This report showed a 40% chance of temperature increase in local streams post-harvest for private forests. It is also conservative, looking at only coastal small and medium fish bearing streams. It is likely that non-fish bearing streams (Type N), which in many cases may be smaller than fish-bearing streams, have similar if not higher probability for in-stream temperature effects. This model only considers shading related issues and as of yet does not appear to evaluate temperature impacts from sediment loading related to forestry operations. (In-stream sediment can increase temperatures).

The Board of Forestry has even directed ODF to review rules and possibly revise riparian protection standards.

5. Impacts of Forest Lands compared to urban development.

The communication from Oregon agencies states in a variety of locations that having lands in forestry is less harmful to streams than having them converted to urban development. While fallow forestry lands definitely have more ecosystem services and less impact to beneficial uses than urban development, it is unclear if this applies to forestry land that is "actively managed". Cutting, soil disturbance, soil exposure and riparian area disturbance can all produce more significant temperature and sedimentation impacts than standard urban development. Is there a study specific to "managed" forest lands?

Suggestions for Program Improvements

- A new CZMA specific general permit.

As mentioned earlier, Oregon proposes to wait for new national stormwater rules before modifying permits to comply with CZMA. There are other options that Oregon should consider before committing to this delay:

1. Similar to the 1200 COLS effort, DEQ should consider a 1200CZMA permit specific to the coastal region. This permit would not have to wait for national rules, but could be structured to reflect the specific CZMA 80% TSS removal requirements. Such a permit could then be revised once the national stormwater rules are adopted.
2. Why are the new 2000J and 2300A pesticide application permits not called out in CZMA submittal documents? While

not strictly related to new development, these permits are related to forestry and agricultural management activities, and likely do apply in the Coastal Zone area.

- Reporting issues

Septic Systems - Why can't DEQ regulate submittal of this "voluntary" information at the time of property transfer? Then DEQ would at least have the paperwork in their files if they found resources to review. Another option is working with septic system management firms and developing a preferred pumper type program similar to what the Portland metro region has used for FOG discharges.

Voluntary Measures Page 16 - how many forestry sites are using the 2007 simplified rules for fish presence field surveys and the voluntary measures for HAP streams? If the state claims these efforts are sufficient they should supply the rate at which these measures are used.

- Add more specific guidance for staff to the TMDL IMD about judging the adequacy of plans, especially plans and reporting submitted by ODA and ODF.
- Update the MOA with ODA and ODF to include specific responsibilities for monitoring, enforcement and reporting requirements for TMDL programs. Look to the 2003 agreement with the BLM for appropriate statements regarding monitoring, prioritization, corrective actions, issues resolution and annual meetings. These agreements should also clearly state the criteria DEQ will use to terminate the agreement and move forward with direct implementation itself. Revise the May 2011 TMDL Toxics issue paper flow charts with ODF and ODA to reflect these new reporting and enforcement requirements.
- DEQ, ODF and ODA should develop a reporting template for these agencies that calls out the specific TMDL compliance elements from their WQMP implementation. Such reporting should specifically address the elements of the applicable WQMP and TMDL. ODF should withhold cost share funds until sufficient plan implementation reporting is provided by their program participants.
- Update the Forest Practices Act (OAR section 629-600) to reflect the requirement for pesticide application discharge permits (2000J and 2300A) on forestry lands. The current chemical and petroleum products language may conflict or be more strict than these permits and should at a minimum refer to the fact that separate application permits are required from DEQ

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From: ACWA [<mailto:gillaspie@oracwa.org>]

Sent: Tuesday, January 21, 2014 9:29 AM

To: Tracy Rutten; Mark Yeager; Stephanie Eisner; Karen Tarnow; FOSTER.Eugene@deq.state.or.us; Erin Doyle; Wendy Edde; Hottenroth, Dawn; Therese Walch; Jennifer Belknap-Williamson

Subject: FW: CZMA meeting 1/31/14

Importance: High

Materials for the DEQ meeting 1/31/14 at 10 am on CZMA issues.

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